UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

RAOUL LAFOND,

Petitioner,

v.

M. ARVIZA,

Respondent.

Case No. 1:22-cv-00786-HBK

ORDER DIRECTING CLERK OF COURT TO ASSIGN CASE TO DISTRICT JUDGE

FINDINGS AND RECOMMENDATIONS TO DISMISS PETITION FOR FAILURE TO STATE A CLAIM[1]

(Doc. No. 1)

FOURTEEN-DAY OBJECTION PERIOD

ORDER DIRECTING CLERK TO PROVIDE PETITIONER WITH CIVIL RIGHTS COMPLAINT FORM

Petitioner Raoul Lafond, a federal prisoner proceeding *pro se*, initiated this action by filing a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241. (Doc. No. 1, Petition). Although submitted on a habeas corpus form, Petitioner acknowledges that his claim involves "prison conditions" and, as such, is properly pursued via either a claim under the Federal Torts Claim Act or a civil rights complaint under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 392-97 (1971). Thus, the undersigned recommends that the

[1] This matter was referred to the undersigned pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302 (E.D. Cal. 2022).

Petition be dismissed for failure to state a cognizable habeas claim.

I. APPLICABLE LAW AND ANALYSIS

A. The Claims Do Not Spell Earlier Release

This matter is before the Court for preliminary review under Rule 4 of the Rules Governing Section 2254 Cases.[2] *See* R. Governing Section 2254 Cases, Rule 1(b); 28 U.S.C. § 2243. Under Rule 4, the Court must dismiss a habeas petition if it "plainly appears" that the petitioner is not entitled to relief. If a prisoner's claim "would necessarily demonstrate the invalidity of confinement or its duration," a habeas petition is the appropriate avenue for the claim. *Wilkinson v. Dotson*, 544 U.S. 74, 82 (2005). In contrast, if a favorable judgment for the petitioner would not "necessarily lead to his immediate or earlier release from confinement," he may assert his claim only under 42 U.S.C. § 1983. *Nettles v. Grounds*, 830 F.3d 922, 935 (9th Cir. 2016).[3]

In both his first and second grounds for relief, Petitioner asserts he is not receiving adequate medical care in violation of the Eighth Amendment. (*Id*. at 3). Specifically, in his first claim Petitioner complains that that he is in constant pain as a result of being shot by a hollow bullet and despite receiving surgical care his medical condition has deteriorated. (*Id*.). In his second claim, Petitioner complains that the doctor at Mendota FCI will not prescribe him orthopedic shoes. (*Id*.). Because the success of either claim would not lead to Petitioner's immediate or earlier release from confinement, the undersigned finds the Petition fails to state a cognizable habeas claim. Instead, because Petitioner is a federal prisoner his claims should be

[2] The Rules Governing Section 2254 Cases may be applied to petitions for writ of habeas corpus other than those brought under § 2254 at the Court's discretion. *See* Rule 1 of the Rules Governing Section 2254 Cases. Civil Rule 81(a)(2) provides that the rules are "applicable to proceedings for . . . habeas corpus . . . to the extent that the practice in such proceedings is not set forth in statutes of the United States and has heretofore conformed to the practice of civil actions." Fed. R. Civ. P 81(a)(2).

[3] In *Nettles*, the Ninth Circuit, in analyzing Supreme Court precedent distinguishing relief available via § 1983 or habeas corpus, concluded if a state prisoner's claim does not lie at "the core of habeas corpus," meaning where success on a claim would not necessarily lead to an immediate or speedier release, then the claim "may not be brought in habeas corpus but must be brought, 'if at all,' under § 1983." *Id*. at 931 (quoting *Preiser v. Rodriguez*, 411 U.S. 475, 487 (1973); 93 S. Ct. 1827 (1973)); *Skinner v. Switzer*, 562 U.S. 523, 535 (2011).

brought via the Federal Torts Claim Act[4] or via a civil action under *Bivens*. Thus, the undersigned recommends that the Petition be dismissed for lack of federal habeas jurisdiction.

B. Conversion to Civil Rights Complaint Not Appropriate

Next, the undersigned considers whether to convert the Petition into a civil rights complaint. "If the complaint is amenable to conversion on its face, meaning that it names the correct defendants and seeks the correct relief, the court may recharacterize the petition so long as it warns the pro se litigant of the consequences of the conversion and provides an opportunity for the litigant to withdraw or amend his or her complaint." *Nettles*, 830 F.3d at 936 (remanding case to district court to consider claim under § 1983). When filing a *Bivens* claim[5] or § 1983 claim, courts require plaintiffs to "plead that (1) the defendants acting under color of state law (2) deprived plaintiffs of rights secured by the Constitution or federal statutes." *Gibson v. United States*, 781 F.2d 1334, 1338 (9th Cir. 1986). A person deprives another of a constitutional right, "within the meaning of § 1983, 'if he does an affirmative act, participates in another's affirmative act, or omits to perform an act which he is legally required to do that causes the deprivation of which complaint is made.'" *Preschooler II v. Clark Cty. Sch. Bd. of Trs.*, 479 F.3d 1175, 1183 (9th Cir. 2007) (quoting *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978)).

The undersigned finds the Petition is not properly convertible to a *Bivens* civil rights complaint for two reasons. First, Petitioner names only the warden as the sole Respondent. Notably, a *Bivens* action may only be brought against an individual defendant in his individual capacity, not in his official capacity. Petitioner does not identify as respondents any persons who allegedly committed the affirmative acts or omissions that allegedly violated his rights. Nor does Petitioner identify the type of relief he seeks, i.e., monetary damages or injunctive relief, or both. Second, automatic conversion would run counter to the Prison Litigation Reform Act. The filing fee for a habeas petition is $5 in contrast to the $350 filing fee assessed to prisoners if granted *in*

[4] Although generally a federal prisoner may bring both a FTCA and *Bivens* claim in the same lawsuit, a FTCA claim is the only remedy for injuries caused by action so the United States Public Health Service physician under 42 U.S.C. § 233(a). *Hui v. Castaneda*, 559 U.S. 799 (2010).

[5] The Supreme Court generally recognizes that "a Bivens action is the federal analog to suits brought against state officials under . . . 42 U.S.C. § 1983." *Hartman v. Moore*, 547 U.S. 250, 254 n. 2 (2002).

forma pauperis status in a civil action. Further, under the Prisoner Litigation Reform Act, a prisoner is required to pay the full filing fee, even if he is granted *in forma pauperis* status, by way of deductions from the prisoner's trust account. *See* 28 U.S.C. § 1915(b)(1). If the Court did convert this action to a § 1983 action, Petitioner would face the larger filing and administrative fees—which he might prefer not to do.

While the undersigned finds the petition is not amendable to conversion, Petitioner is free to file a civil action under the FTCA or *Bivens* in a separate action, if appropriate. In doing so, Petitioner is advised that a complaint must contain a short and plain statement that plaintiff is entitled to relief, Fed. R. Civ. P. 8(a)(2), and provide "enough facts to state a claim to relief that is plausible on its face," *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The plausibility standard does not require detailed allegations, but legal conclusions do not suffice. *See Iqbal*, 556 at 678. If the allegations "do not permit the court to infer more than the mere possibility of misconduct," the complaint states no claim. *Id*. at 679. The complaint need not identify "a precise legal theory." *Kobold v. Good Samaritan Reg'l Med. Ctr*., 832 F.3d 1024, 1038 (9th Cir. 2016). Instead, what plaintiff must state is a "claim"—a set of "allegations that give rise to an enforceable right to relief." *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1264 n.2 (9th Cir. 2006) (en banc) (citations omitted). The complaint must state what actions each named defendant took that deprived plaintiff of constitutional or other federal rights. *See Iqbal*, 556 U.S. at 678; *Jones v. Williams*, 297 F.3d 930, 934 (9th Cir. 2002). Further, a plaintiff must identify what relief he seeks on his complaint.

II. RECOMMENDATION AND ORDER

Accordingly, it is **ORDERED**:

1. The Clerk of Court is directed to send Petitioner a civil rights complaint form with these Findings and Recommendations.

2. The Clerk of Court is directed to assign this case to a District Judge for the purposes of reviewing these findings and recommendations.

It is further **RECOMMENDED**:

The Petition be dismissed for failure to state a cognizable habeas claim. (Doc. No. 1).

NOTICE TO PARTIES

These findings and recommendations will be submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within **fourteen (14) days** after being served with these findings and recommendations, a party may file written objections with the Court. The document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Parties are advised that failure to file objections within the specified time may result in the waiver of rights on appeal. *Wilkerson v. Wheeler*, 772 F.3d 834, 838-39 (9th Cir. 2014) (citing *Baxter v. Sullivan*, 923 F.2d 1391, 1394 (9th Cir. 1991)).

Dated: July 13, 2022

HELENA M. BARCH-KUCHTA
UNITED STATES MAGISTRATE JUDGE